IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1438

Office-Supreme Court, U.S.
FILED
MAY 13 1970
JOHN F. DAVIS, CLERK

CROWN CENTRAL PETROLEUM CORPORATION,
Petitioner,

vs.

MYRTLE LUCILLE GOODMAN TREXLER,
Administratrix of the Estate of
ROBERT W. TREXLER, Deceased,
BARGE NO. 104, in rem,
L & L TOWING CORPORATION,
SOUTHERN TRANSPORTATION CO., INC.,
Tug RAVEN, in rem,
VERMILLION TOWING CORPORATION,
RICHARD S. SMITH,
WILLIAM E. LAW,
ROBERT R. VERMILLION,
WILLIAM W. MARSHALL,
Respondents.

ANSWER OF BARGE NO. 104, ET ALS, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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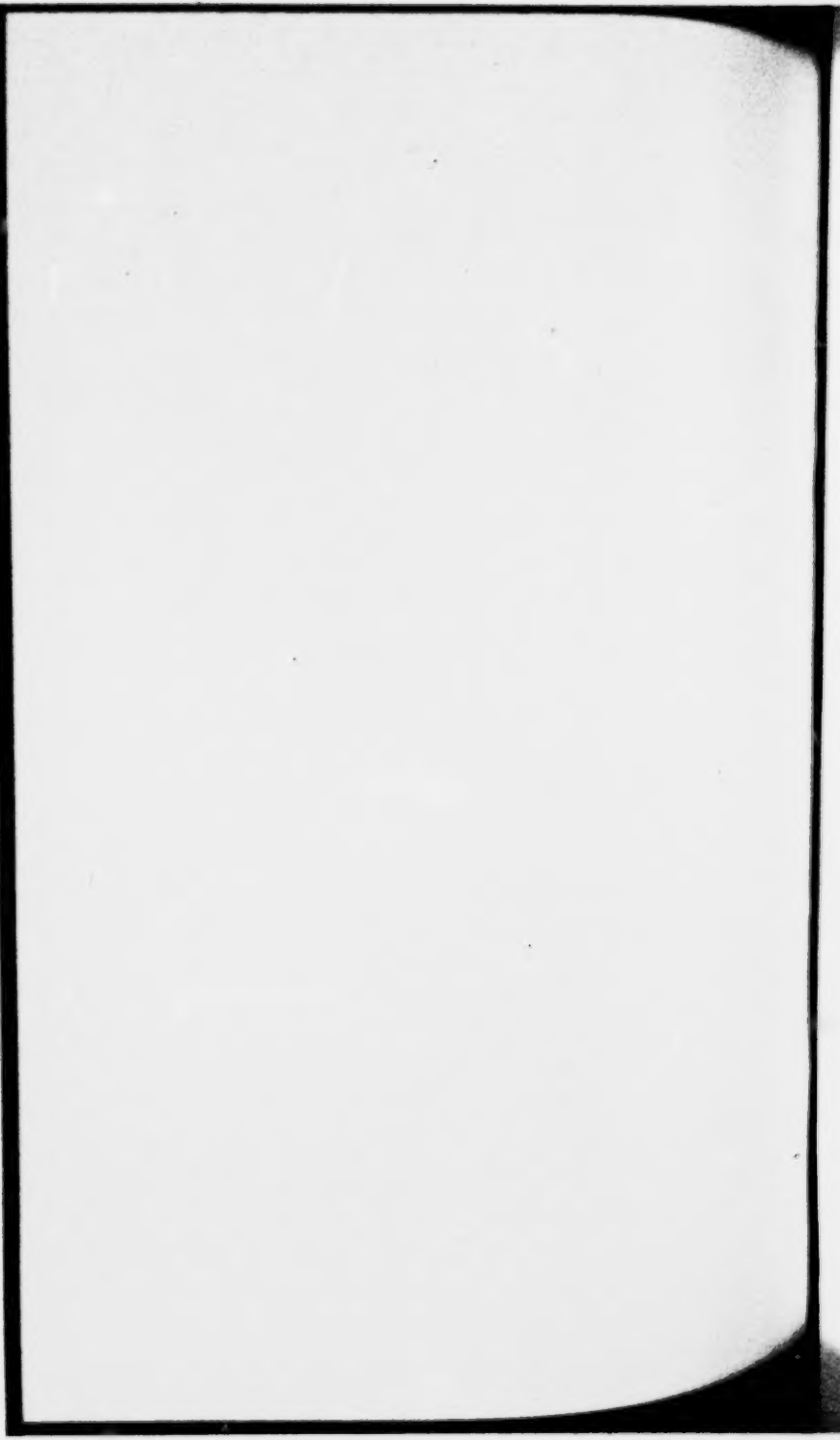
PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.



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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Barge No. 104, in rem, L & L Towing Corporation, Southern Transportation Co., Inc., Tug RAVEN, in rem, Vermillion Towing Corporation,

Richard S. Smith, William E. Law, Robert R. Vermillion and William W. Marshall, respondents, respectfully request that this Court deny the petition of Crown Central Petroleum Corporation for issuance of a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in these consolidated matters on January 22, 1970.

THE QUESTION PRESENTED

In its petition for a rehearing filed with the Court of Appeals, petitioner raised the identical question it now presents to this Court, namely, whether the Appellate Court had jurisdiction to enter judgment for Trexler's Administratrix against petitioner when said Administratrix failed to formally note an appeal from the District Court's findings which exonerated petitioner. The United States Court of Appeals decided the issue against petitioner and in favor of Trexler's Administratrix citing its reasons therefor. The resolution of this issue did not then and does not now affect these respondents. In responding to petitioner's petition for a rehearing in the Court of Appeals, these respondents did not address themselves to that issue, and will not do so here because of their reluctance to take a partisan position on a question which does not concern them.

These respondents are constrained to advise the Court, however, that since these respondents had no control over the decision of Trexler's Administratrix not to appeal petitioner's exoneration by the District Court, it necessarily follows that they should not be prejudiced by the implications, if any, which flow from her failure to note an appeal.

Had petitioner limited comment in its petition to the specific question presented for consideration by this Court, neither the tug owner, barge charterer or Smith

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would have cause to reply, because this Court can grant or deny petitioner the relief it seeks from the recovery by Trexler's Administratrix without disturbing or affecting the opinion of the Court of Appeals as it applies to these respondents. However, while petitioner, in the question presented, does not contest the findings of the Court of Appeals holding it solely at fault for the fire and exonerating these respondents, under the heading of its reasons relied upon for the allowance of a writ, petitioner indirectly attacks these findings and goes beyond commenting on the question specifically presented. A brief reply is warranted.

STATEMENT OF THE CASE

This litigation was commenced when Trexler's Administratrix sued the Tug RAVEN, its owner, the Barge 104, its owner and charterer, the tug master and mate, the two presidents of the corporations owning the tug and barge, individually, and Crown Central Petroleum Corporation in the United States District Court. The tug and barge interests and petitioner cross-claimed against one another, and the tug and barge owners sought limitation of liability. The District Court exonerated petitioner, the tug master and the presidents of the two corporations owning the tug and barge and held the tug, its owner, the barge, its charterer, and the tug mate solely at fault for the fire. It awarded Trexler's Administratrix a Jones Act recovery against the tug owner who was held to be Trexler's employer, a relationship necessary in order to obtain a Jones Act judgment, and a recovery under the Virginia Death by Wrongful Act Statute against the barge charterer and the tug's mate, Smith. The recovery under the Virginia Death Act against the barge charterer and Smith were not in addition to the Jones Act recovery but were only to be enforced in the event the tug owner failed to sat-

isfy the Jones Act judgment in full. The tug, its owner, the barge, its owner and charterer and the tug's mate, Smith appealed. Trexler's Administratrix noted no appeal. Petitioner noted no cross appeal concerning the exoneration of the tug master, William W. Marshall, and/or the two corporate presidents, Robert R. Vermillion and William E. Law, who had been sued individually. Therefore, William E. Law, Robert R. Vermillion and William W. Marshall should not have been named as respondents by petitioner, as the matter is final as to them.

The United States Court of Appeals for the Fourth Circuit reversed the decision of the District Court and exonerated everyone but petitioner, whom it held solely at fault for the fire and Trexler's death. It allowed Trexler's Administratrix a recovery from petitioner under the Virginia Death by Wrongful Act Statute notwithstanding her failure to note an appeal of the District Court's exoneration of petitioner. Petitioner contends that the Appellate Court lacked jurisdiction to enter this judgment against it in favor of Trexler's Administratrix, and presents this question to The Court for review. While this specific question does not affect the rights of these respondents, they feel it incumbent upon them to correct several misleading comments in petitioner's statement of the case.

The implication of the first paragraph of petitioner's statement of the case is that Smith, the tug's mate, supervised the discharge of gasoline from the barge and Chadwick, Crown's terminal superintendent, supervised the loading of the shore tank. While Smith, a tankerman, did operate the barge pumps, Chadwick had complete overall responsibility for the entire unloading operation. The Court of Appeals recognized this fact in its opinion (Petitioner's Appendix D., page 70a):

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"At trial Crown's assistant operations manager for the eastern states testified that Chadwick was the Crown employee responsible for the unloading of the barge and safety of operations. He stated unequivocally that the operation should have been discontinued if necessary to prevent an unsafe accumulation of gasoline vapors . . .

As in *Sinclair,* liability must be imposed on the party who allowed highly inflammable and explosive gases to escape under circumstances which resulted in death and widespread property destruction. That person, on this record, was Crown, and we hold Crown solely responsible."

Petitioner in the third paragraph of its statement of the case on page 3 of the petition suggests that the District Court determined the cause of the fire by first determining the location of ignition and then the cause of ignition. It was precisely for this reason that the Court of Appeals found the District Judge clearly erroneous. The District Judge mistakenly correlated the source of ignition with the cause of the fire. He failed to explain the source of the vapors which were ignited.

The Court of Appeals for the Fourth Circuit adopted the law of *Petition of Sinclair Navigation Co.,* 27 F.2d 606 (S.D.N.Y., 1928) as the law of the Fourth Circuit. The fault must be placed, said the Court of Appeals, on the party allowing the gases to escape and accumulate in dangerous quantity. The opinion of the Court in the *Sinclair Case,* supra, is quoted extensively in the opinion of the Court of Appeals in the instant case (see Petitioner's Appendix D., pages 71a-72a).

The District Judge had the instant case under advisement for almost six years. The Court of Appeals, after a thorough review of the record, was in equally as

good a position to review the evidence as was the Trial Court. The Court of Appeals rejected the District Court's theory that the source of ignition was the sole cause of the fire. Its reasons are clear (Petitioner's Appendix D., page 68a):

> "On the record before us the source of ignition of the fire cannot be determined . . .
>
> Ignition might well have occurred without fault on the part of the barge, tug or any other person, i.e., from static electricity, or a nail in the shoe of someone striking a steel object, the striking of the steel barge against a metal fixture on the dock, etc. Of direct concern, therefore, is what the record establishes with regard to the availability of fuel. We read the record to establish that Crown, in dereliction of its duty, permitted an unreasonable and dangerous accumulation of gasoline vapors to collect so that when ignition without fault occurred, the holocaust ensued."

At the bottom of page 4 of its petition, petitioner implies that the Court of Appeals held the District Court "clearly erroneous" solely because the District Court rejected Smith's testimony. This is manifestly untrue as a mere reading of the Appellate Court's decision will evidence.

The Court of Appeals discussed in detail the testimony of both Smith and Chadwick and concluded that on the whole record they were "left with the definite and firm conviction that a mistake has been committed. (*United States* v. *United States Gypsum Co.*, 33 U.S. 364, 395)." (Petitioner's Appendix D., page 64a). There can be no dispute that this was a proper exercise of judicial discretion. More important, however, is the fact that the Court of Appeals did not hold petitioner at

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fault because of its acceptance or rejection of Smith's testimony or Chadwick's testimony. Petitioner was held solely responsible on the uncontroverted evidence that it allowed a dangerous accumulation of vapors in dereliction of its duty and this fact was affirmed by numerous independent witnesses. Said the Court of Appeals (Petitioner's Appendix D., page 74a-75a):

> "We predicate our conclusion of Crown's liability *solely* on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred." (Emphasis ours.)

REASONS RELIED ON FOR DENIAL OF WRIT

I. The Question Presented Does Not Place in Issue the Appellate Court's Exoneration of the Tug, Barge and Tug Mate, Smith, or the Fixing of Fault on Crown, and this Issue is not a Subsidiary Issue Fairly Comprised Within the Question Presented.

Rule 23(1)(c) of the United States Supreme Court required the petitioner to state the questions presented for review. The Rule further states that *only* the questions set forth in the petition *or fairly comprised therein*, will be considered by the Court.

Manifestly, the issue of the exoneration of the tug, barge and Smith and the issue of the fixing of sole fault on petitioner is not contained in the question presented as phrased by the petitioner. Neither can it really be said that these issues are fairly comprised within the question that is presented in the petition.

Notwithstanding its failure to present these questions directly, for obvious reasons, petitioner seeks entry through the back door by smokescreening its real com-

plaint with the Fourth Circuit, namely, the fixing of sole fault for the fire on petitioner. This Court should not be misled by these tactics.

As an example of what respondents mean, please note this quote from page 7 of petitioner's petition:

> ". . . the appellate court has not only revised the District Court's factual findings (i.e., as to the proximate cause of the fire, as to the place where the fire originally broke out and as to the cause of ignition) but also has revised the District Court's judgment, both revisions being in favor and for the benefit of Trexler's estate . . ."

The foregoing paragraph is hidden under the heading of Point I wherein petitioner claims that the Appellate Court's allowance of a recovery by Trexler's Administratrix against petitioner under the circumstances is in conflict with decisions of the Supreme Court of the United States. The above quoted paragraph is not related to the point to which it is addressed. It is actually a not so subtle attack upon the Court of Appeals' exoneration of the vessels and its fixing of responsibility on petitioner. Beyond this, the quoted paragraph is misleading.

The Court of Appeals certainly revised the District Court's conclusion as to the proximate cause of the fire, and rightfully so. It was, however, a conclusion and not a finding of fact. The Court of Appeals found the District Court clearly erroneous in finding Smith's flashlight as the source of ignition. Whatever the source of ignition, said the Appellate Court, (and on this record it cannot be pinpointed) the sole proximate cause of the fire was the large quantity of gasoline vapors which petitioner allowed to accumulate. Petitioner has consistently refused, by design or otherwise, to recognize this

and from the nature of its petition has attempted to keep this fact from this Court.

II. The Decision of the Court Below Does Not Conflict with this Court's Decisions in McAllister vs. United States, 348 U.S. 19, and Guzman vs. Pichirilo, 369 U.S. 698, and Does Not Constitute an Abuse of The Appellate Function.

This is in answer to Point IV of petitioner's reasons for allowance of a writ which begins at page 11 of the petition. Respondents offer this brief reply because the argument offered by petitioner under this point is not directed to the specific question presented to this Court for review, but is actually a broad assault on the Court of Appeals' entire opinion including its exoneration of the tug, barge and Smith and its fixing of sole fault on petitioner.

Petitioner's argument under this point is but a repetition of its argument filed with the Fourth Circuit which was rejected there and should be rejected here.

Respondents concur that the *de novo* concept of an admiralty appeal was laid to rest by this Court's opinion in *McAllister* v. *United States,* supra. Respondents further agree that findings of fact should not be set aside unless clearly erroneous and that due regard should be given to the trial court's opportunity to judge the credibility of the witnesses.

Respondents, however, do not deem the opinion of the Court of Appeals in the instant case to be the result of its considering the appeal as a trial *de novo.* The Court of Appeals, fully cognizant of the law as set forth in *McAllister* v. *United States,* supra, did not consider the case *de novo,* though in this instance, where

the District Court had the matter under advisement almost six years, the Court of Appeals was no doubt equally as capable of considering the record as was the Trial Judge and certainly, under the circumstances, little weight should be given the Trial Judge's opportunity to judge the credibility of witnesses. More especially is this so when he relied exclusively on the testimony of Chadwick, a witness he never saw, who testified only at a Coast Guard inquiry.

On page 12 of its petition petitioner cites seven "specific examples" in support of its allegation that the Court of Appeals conducted a trial *de novo*. Each of the seven alleged specific examples is easily refuted.

Petitioner alleges that the Court of Appeals was unable to cite any example where the District Court's analysis of the evidence was unsupported or uncorroborated. The fact is and the record confirms that Chadwick's testimony was unsupported and uncorroborated, even by his own fellow employee, Price.

Petitioner alleges that the Court of Appeals used as a basis for its decision evidence rejected by the District Judge for credibility reasons. This is patently untrue. The evidence that a dangerous accumulation of vapors existed and that the vapors came from petitioner's tanks was uncontroverted and it was the accumulation of these vapors which was the basis of the Fourth Circuit's decision.

Petitioner alleges that the Court of Appeals excused Smith's untruths, etc., on the grounds he was not an overly intelligent witness. Clearly this is not the case. The Court of Appeals admitted that Smith was not the most satisfactory witness, but observed that on the crucial issues of the case, Smith's testimony was corroborated

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by the testimony of others whose credibility the District Judge did not question. On the other hand, Chadwick's testimony was uncorroborated and even contradicted by his own fellow employee, Price.

Petitioner alleges that the Court of Appeals accepted and adopted Smith's testimony as the basis for new findings and conclusions. Whether because it fails to understand the Fourth Circuit's opinion or because it refuses to, petitioner ignores the fact that the basis of that court's opinion was that petitioner was responsible for a dangerous accumulation of fumes, the natural result of which was a fire, and that the source of ignition was not crucial in determining liability. In fact, the source of ignition could not be determined on this record according to the Court of Appeals.

Petitioner alleges that the Court of Appeals criticized Chadwick's testimony only because it was uncorroborated when in fact the Court's criticism went further than that. The Court said that Chadwick's testimony was not only uncorroborated, but in fact, contradicted by his fellow employee, Price, and subject to question because of Chadwick's subsequent suicide.

Petitioner alleges that the Fourth Circuit speculated that an overflow caused the fire. The Court's opinion clearly is not based on such a speculation. In commenting on the overflow theory caused by Chadwick's failure to switch valves, the Court of Appeals said: (Petitioner's Appendix D., pages 74a-75a)

> "However intriguing the failure-to-switch theory may be, *we make no finding in this regard.* We predicate our conclusion of Crown's liability *solely* on its failure to have stopped the discharge before a dangerous and combustible accumulation of explosive vapors occurred." (Emphasis ours.)

Finally, petitioner alleges that the Court concluded, without any evidence, that Chadwick's suicide was a form of flight. Actually, the Court merely commented that under the generally accepted rules of evidence, flight after the commission of a crime was evidence of guilt and that suicide was a form of flight. The Court said it had to give weight to the suicide in judging the credibility of Chadwick's testimony.

CONCLUSION

The petition raises no question affecting the rights or liabilities of the Tug RAVEN, its owner, Barge 104, its owner and charterer, Smith (the tug's mate) or William W. Marshall, William E. Law or Robert R. Vermillion. If the petition raises any question, it involves the rights of petitioner and Trexler's Administratrix and the granting of the writ should be limited to this issue. The judgment of the United States Court of Appeals as it affects these respondents should be affirmed.

For the foregoing reasons, these respondents pray that the writ of certiorari as to these respondents be denied.

Respectfully submitted,
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